

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Court's order whether the case is or not approved for reporting

(Chapter VIII, Rule 32(2) (b))

Description of Case

Criminal Appeal No. 732 of 2001

Bala Dutt

Vs.

State

Date of decision :-07/3/2006

A.F.R. (Approved for Reporting)

~~Not approved for reporting~~

Date :-07/3/2006

Initials of Judge

Note :- Bench Reader will attach this at the top of the first page of the judgment when it is put up before the Judge for signature.

HIGH COURT OF UTTARANCHAL, AT NAINITAL

CRIMINAL APPEAL NO.732 OF 2001

{Old No.234 of 1984}

Bala Dutt
S/o Sri Shiv Dutt
R/o village Banna Bansa
Patti Pin Rau
P.S. Pin Rau
District Nainital

.....Appellant

Versus

State of Uttaranchal

.....Respondent

Date :- 07th March, 2006

Mr. J. C. Joshi learned Advocate assisted by Sri Chetan Joshi learned counsel
for the appellant

Sri G. S. Sandhu learned G.A. and Sri Sudhir Chaudhary learned Brief Holder.

Hon'ble J.C.S. Rawat, J.

1. This a criminal appeal against the judgment and order dated 17.01.1984 passed the 1st Addl. Sessions Judge, Nainital in S.T. No.63/1982, whereby the appellant was convicted and sentenced to undergo R.I. for two years and three months under section 452 I.P.C. and section 323 I.P.C. respectively. The appellant was also sentenced to undergo R.I. for a period of seven years under section 376 I.P.C. All the sentences would run concurrently.

2. The prosecution case in a nutshell is that on 26.1.1982 the appellant came to the house of the prosecutrix when her husband Madhawa Nand (PW2) was not present in the house. In absence of her husband, the prosecutrix and her child was alone in the house. The appellant entered into the room and sat near the cot of the prosecutrix. Thereafter, he started talking with the prosecutrix and then the prosecutrix stated him to go away from her house, but he did not

do so. Thereafter, the appellant tried to outrage her modesty and there was a struggle between them, but the prosecutrix was overpowered by him and the appellant committed rape upon her. When she was overpowered by the appellant she raised the alarm and her husband, who was coming towards his house, came there. Her husband entered into the house and tried to catch hold the appellant, but the appellant made his escape good. During this, the piece of bandi and bushirt has come in the hand of her husband. Thereafter, on the next day a report (Ex.ka.1) was lodged at about 10a.m. before the Patti Patwari, who prepared the chick FIR (Ex.Ka.3) and entry to that effect was made in the G.D. (Ex.ka.4). Jiwan Chandra Patti Patwari reached the spot on the same day and recorded the statement of the prosecutrix. He also prepared the site plan (Ex.Ka.5). Thereafter, the prosecutrix was medically examined by Dr. R. Bahara (PW5). The investigation was taken up as usual which culminated into the submission of the chargesheet (EX.Ka.6).

3. Charges were framed against the appellant. He denied the charges and claimed the trial.

4. The prosecution in support of its case examined Witnesses. PW1 was the prosecutrix and Madhama Nand (PW2) was the husband of the prosecutrix. The prosecutrix was medically examined by Dr. R.Bahem (PW3) on 27.01.1982. The following injuries were found on the person of prosecutrix:-

- (i) Contusion around left eye.
- (ii) Lacerated wound 1 x ½ cm over left eyebrow which was covered with

hairs matted with blood, serum was likely dried blood clot spotted all over the breast which is separated by rubbing external wearings, such as blouse were torn.

- (iii) Abrasion swelling over the right elbow joint clot present which shows friction over rough surface.
- (iv) Teeth bites over inner surface of right thigh.
- (v) Nail scratches over vulva and lower abdomen above symphysis pubis and below umbilicus.
- (vi) Small linear scars over left knee joint over which blood clot present. Abrasion inner side of left thigh.
- (vii) Contusion over sacro-coccygeal joint. Dried blood clot attached over buttocks and thigh which was disintegrable.

5. The prosecution has also adduced the evidence of Jiwan Chandra (PW4). He as the Patti Patwari, who proved the chick FIR (EX.ka. 3) and site plan (Ex.ka.5).

6. In the statement recorded u/s 313 Cr.P.C. the accused person denied the prosecution case and stated that he has been falsely implicated in this case.

7. The learned trial court after appraisal of the evidence on record, the appellant was found guilty and convicted and sentenced him as mentioned above.

8. I have heard the learned counsel for the parties and perused the evidence on record.

9. The victim appeared before the court as PW1 and she had narrated the entire story as has been indicated in para 2 of my judgment. PW2 Madhama Nand is the husband of the victim. He heard the noise and cry of his wife (victim) and he was going towards his house from out station. He immediately reached at the spot and the appellant was found inside his house and he tried to apprehend him but the appellant made his escape good.

10. It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted without corroboration in material particulars. She stands on a higher pedestal than an injured witness. In the latter case, there is injury on the physical form, while in the former it is physical as well as psychological and emotional. However, if the court on facts finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial which would lend assurance to her testimony. Assurance, short of corroboration, as understood in the context of an accomplice, would suffice.

11. Sexual violence apart from being a dehumanizing act is an unlawful intrusion on the right of privacy and sanctity of a female. It is a serious blow to her supreme honour and offends her self-esteem and dignity – it degrades and humiliates the victim and

where the victim is a helpless innocent child or a minor, it leaves behind a traumatic experience. A rapist not only causes physical injuries but more indelibly reputation and not the least her chastity. Rape is not only a crime against the person of a woman, it is a crime against the entire society. It destroys the entire psychology of a woman and pushes her into deep emotional crisis. It is a crime against basic human rights. The courts are, therefore, expected to deal with cases of sexual crime against women with utmost sensitivity. Such cases need to be dealt with sternly and severely.

12. Now, I would like to discuss the respective contentions of the parties. The learned counsel for the appellant contended that the prosecution has not adduced the evidence of Km. Durga, who was the daughter of the prosecutrix. It was contended that she was asleep with her mother. When the scuffle was going on she got up and she was the evidence of the incident. It was further contended that non-examination of Km. Durga is fatal to the prosecution story and the appellant is entitled to be acquitted on this score. Learned A.G.A. refuted the contention. It is not always necessary to multiply the evidence of the incident on the same point. It has to be seen what is the quality of the witnesses. It is the quality of the evidence and not the quantity, which is required. It is the evidence available on record is otherwise satisfactorily in nature and can be said to be trustworthy and increase in the number of witnesses cannot be turned up as the requirement of the case. If the prosecution establishes the guilt of the appellant beyond reasonable doubt, there is no need to produce

the other evidence in the case. The prosecution has adduced the evidence of the prosecutrix and her husband. The witnesses if they are participating in that event their evidence cannot be thrown outrightly on the ground that the other witness has not been produced. If the witnesses are trustworthy then it is not required that there should be a multiplicity of evidence. I am fortified with the view taken by the Hon'ble Supreme Court in **Komal and others Vs. State of U.P. 2002 SCC (Cri) 1600** as under:-

“Learned counsel next contended that though, according to the statements of witnesses, some villagers had arrived at the place of occurrence when the members of the prosecution party were begin assaulted and they intervened in the matter, none of them has been examined in the case on hand. In our view, non-examination of these witnesses by itself would not affect the veracity of the prosecution case when the evidence of PWs 2 and 4, the two injured eye witnesses who had received multiple injuries, has been found to be trustworthy and their evidence is corroborate by the informant PW 5 and supported by medical evidence as well as objective finding to the investigating Officer.”

13. It has been further held in **Babu Ram vs. State of U.P.; 2002 SCC (Cri) 1400** as under:-

“It is was submitted by the learned counsel for the appellants that Ram Autar, an independent eye witness present at the scene of occurrence according to the

prosecution case and a government servant has not been examined, and therefore, an adverse inference should be drawn against the prosecution. It is settled law that non-examination of an eye-witness cannot be pressed into service like a ritualistic formula for discarding the prosecution case with a stroke of the pen. An effort should be made at appreciating the worth of such evidence as has been adduced. If the evidence coming from the mouth of the eye witnesses examined in the case is found to be trustworthy and worth being relied on so as to form a safe basis for recording a finding of guilt of the accused persons then non-examination of yet another witness who would have merely repeated the same story as had already been narrated by other reliable witnesses would not cause any dent or infirmity in the prosecution case. In the case at hand we additionally find from the testimony of Ashrafi Lal that in spite of being a government servant and not involved in local village disputes he is afraid of deposing against the accused persons and there is substance in the submission of the learned counsel for the State that Ram Autar if tendered in the witnesses box would have followed the same track as was chosen by Asharfi Lal P.W.3."

In view of the aforesaid discussion, the contention of the learned counsel for the appellant has not force.

14. The learned counsel for the appellant further contended that there are major contradictions and exaggerations and embellishments in the testimony of the witnesses. The learned counsel for the appellant further contended that there are certain contradictions in the testimony of PW1 and PW2. It was pointed out that the prosecutrix has stated that the Patwari, who lodged the report, came to the house of the prosecutrix at about 8a.m. Whereas the PW2 has stated that the Patwari reached at the spot at about 2p.m. The FIR was lodged at about 10p.m. on the date of incident and there was no question that the Patwari reached the spot prior to the lodging the report. It was pointed out that there is a contradiction in between the testimony of the witnesses. It was further pointed out that the prosecutrix had stated that she sustained the injury on the right thigh, whereas the medical report shows that she sustained injury on the left thigh. It was also pointed out that she stated that her husband has left the house two days prior to the date of incident, whereas her husband has stated that he when out the house one day before the incident. I have gone through the entire evidence of the matter. It is pertinent to mention here that the witnesses of this case belong to the village area and they are totally rustic witnesses. Perusal of the statements of these two witnesses reveals that the status of these witnesses is not much high and they are not so much qualified. The observation differs from person to person and what one may notice, another may not. An object or moment might emboss its imagine on one person's mind whereas it might go unnoticed on the part of another. By and large the people cannot accurately recall a conversation and repeat the story

what they saw or heard. They can only recall the main purport of the story. It is unrealistic to expect a witness to be a human tape-recorder. The witness cannot be expected to pose a photographic memory and to recall the details of an incident. Ordinarily if so happens that witness is overtaken by the events, the witness could not have anticipated the occurrence, which so after has an element of surprise. Ordinarily a witness cannot be expected to recall accurately the sequences of events, which took place in a rapid succession or in a short time of span. A witness is likely to get confused or mixed up when interrogated, later on. As the person who has witnessed an incident, like the present one reacts in his own way. Some are stunned, some become speechless and some stand uprooted from the spot. Thus every individual reacts on his own way. There is no set of rules of natural reaction.

15. If the contradictions do not affect the prosecution story, the courts should not take into account such discrepancies, which are bound to come on the testimonies. The discrepancies as pointed out by the learned counsel for the appellants are not of such consequences, which can be named as the boulders of the prosecution. The court is within its jurisdiction being the first appellate court to reappraise the evidence, but he discrepancies found in the ocular account of two witnesses unless they are so vital, cannot affect the credibility of the evidence of the witnesses. There are bound to be some discrepancies between the narrations of different witnesses when they speak on details, and unless the contradictions are of a material dimension, the same should not be used to jettison the evidence in its entirety. Incidentally,

corroboration of evidence with mathematical niceties cannot be expected in criminal cases. Minor embellishment, there may be, but variations by reason therefore should not render the evidence of eyewitnesses unbelievable. Trivial discrepancies ought not to obliterate an otherwise acceptable evidence. **{See Leela Ram Vs. State Of Haryana 2000 SCC (Cri) P/222}**. It has also been held that the Court should have to bear in mind that different witnesses react differently under different situations: whereas some become speechless, some start wailing while some others run away from the scene and yet there are some who may come forward with courage, conviction and belief that the wrong should be remedied. There cannot be any set pattern or uniform rule of human reaction and to discard a piece of evidence on the ground of his reaction not falling within a set pattern is unproductive and a pedantic exercise. The contradictions pointed out by the defence are not vital and these contradictions do not change the genesis of the prosecution story. I do find any substance in the argument advanced by the learned counsel for the appellant.

16. Learned counsel for the appellant further contended that the incident took place on 26.1.1982 at about 11p.m. and the report was lodged before the Patwari on 27.1.1982 at about 10am. The delay in lodging the FIR creates a doubt about the veracity of the version written in the report. Learned A.G.A. refuted the contention. It is in the evidence of PW2 that the distance between the place of incident and the Chowki of the patwari is about 9km. The occurrence took place in the night at about 11pm. It is also in the

evidence of PW2 that there falls a jungle between the Chowki and the place of incident. The report was lodged on the next day when PW2 went to the Patwari. It is to be kept in mind that the incident took place in hilly area where the means of communication are not good and the people has to cover the distance on foot in most of the cases. It is natural that PW2 would not go to the Patwari in the night itself and in the morning three to four hours would have been taken to reach at the Chowki. Therefore, explanation submitted by the prosecution is sufficient to explain the delay in lodging the FIR. I do not find any substance in the contention of the learned counsel for the appellant.

17. It was further contended that there was no source of light to identify the accused at the time of incident. In absence of light, it cannot be held that the appellant has committed the offence of rape on the fateful night. Learned A.G.A. refuted the contention. Perusal of the record reveals that it is in the evidence that the appellant was known to the prosecutrix. It is also in the statement recorded under section 313 Cr.P.C. that there was a transaction between the parties with regard to the purchase of land. It is also in the evidence that they knew each other. The parties are known to each other and as such there was no chance of her making a mistake about his identify. The appellant could be identified by voice and expressions. It is also in the evidence that the appellant entered into the house of the prosecutrix and sat on the cot. Certain conversations were made between them. Therefore, there was sufficient reason to recognize the accused even in the night hours. The prosecutrix had sufficient opportunity to observe the features of the

accused who raped her. This is not a case where the identifying witness had only a fleeting glimpse of the accused. The victim had a reason to remember the face of the accused as he had committed a heinous offence and put her on shame. There was no chance of making a mistake about the identity of the appellant.

18. It was further contended that the appellant has been falsely implicated due to enmity. It was also contended that the appellant has stated in his statement recorded under section 313 Cr.P.C. that he purchased land of the complainant @ Rs.65,000/- and he paid only Rs.45,000/- to the complainant and he gave a receipt of Rs. 15,000/- only. It is also in the evidence of PW2 that he sold the land to the appellant. It was further contended that the complainant wanted to falsely implicate him as the appellant has not paid the whole amount. During the argument it was also admitted that when he was in Delhi, the said land was sold by the complainant. It is not the case where the appellant went to the complainant and demanded money back or asked to register the sale deed in his favour and the complainant refused the same. It is not the suggestion of the defence. Perusal of the record reveals that there is no statement or any suggestion on behalf of the appellant in this regard. As such, it cannot be said that the appellant has been falsely implicated in the case. The land was sold to another person after the incident. Thus, it does not affect on the prosecution story. Apart this, if the complainant would have to falsely implicate the appellant, there could have been other means. It is pertinent to mention here that even if there were an enmity, a lady would never come forward to say that she had been raped by the

accused. In the Indian society if a woman says that she has been raped, she loses her honour in the society. It is a serious blow to her supreme honour and offends her self-esteem and dignity. It destroys the entire psychology of a woman and pushes her into deep emotional crisis. As such, no women will come forward to say that her honour and dignity has been snatched by the accused. The reluctance to go to the police is because of society's attitude towards such women. It casts doubt and shame upon her rather than comfort and sympathy. The trial court has also held that there is no evidence on record which shows that the lady was having a loose character or she was having illicit relations with other. I do not find any substance in the contention raised by the learned counsel for the appellant.

19. It was further contended that the I.O. had not been produced before the court and non-production of I.O. is fatal to the prosecution story. Learned A.G.A. refuted the contention. It is true that the I.O. has not been produced before the court below. It is a settled position of law that non-production of the I.O. is not fatal in the case. The defence could not show that any prejudice has been caused to him by non-production of I.O. There was no material contradiction under section 161 Cr.P.C. which required to be proved by the I.O. in this case.

20. It was further contended that the I.O. had taken the blouse and a piece of undershirt and shirt into his possession, but these articles were not produced before the court. It is also in the evidence that PW1 has stated that she handed over these articles to the I.O. at

about 2pm. Learned A.G.A. refuted the contention. It is well settled position of law that the testimony of the witnesses if found credible and cogent the defect on the part of the Investigating Officer cannot be taken into account. This is a remissness on the part of the Investigating Officer, which does not help the appellants. It has been observed by the Hon'ble Supreme Court in **Dhanaj Singh @ Shera and others Vs. State of Punjab 2004 (3) SCC P-654** that in the instant case, the High Court found several disturbing features which indicated how the investigating Officer had made out a new case to save the accused persons and to implicate the complainant party. Hence, the High Court analyzed the evidence of the eye witnesses with due care and caution. On finding the said evidence to be credible, the High Court upheld the conviction recorded by the trial court. Before the Hon'ble Supreme Court, the accused appellants challenged the conviction on the grounds (1) that the police after thorough investigation had concluded that it was the complainant party which caused the death of the deceased (ii) that the pellets, wads and cartridges were not recovered from the spot, (iii) that the weapons of assault and the pellets were not sent for ballistic examination, (iv) that the blood stained earth was not sent for chemical examination (v) that many persons who could have thrown light on the incident had not been examined, and (vi) that the evidence being that of highly interested and inimical persons, should have been discarded. Dismissing the appeal, it was held by the Apex Court that even if the investigation is defective, that pales into insignificance when ocular testimony is found credible and cogent. In the case of a defective investigation the court has to be

circumspect in evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect. To do so would tantamount to playing into the hands of the investigating officer if the investigation designedly defective. It has been held in **Chhotu Vs. State of Maharashtra 1997 CRI.L.J 4394 (SC):-**

“That necessarily means that all of them were the most natural and problem witnesses to an incident that then took place near his house, notwithstanding the fact that they were not residents of that locality. It also requires to be mentioned here that if the Investigating Officer failed to seize the bloodstained clothes of PWs 3 and 8 and to promptly examine PW3, whose names as any eye witness was disclosed immediately after the incident, it only indicates remissness on his part but the evidence of PW3 and 8 was not in any way impaired thereby.”

21. The Apex Court has, while maintaining the conviction of the appellant in **Karnel Singh Vs. State of M.P. 1995 CRL.L.J 4173**, observed:-

“Notwithstanding our unhappiness regarding the nature of investigation, have to consider whether the evidence on record, even on strict scrutiny, establishes the guilt. In case of defective investigation the Court has to be circumspect in evaluating the evidence but it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the Investigating Officer if the

investigation is designedly defective. Any Investigating Officer, in fairness to the prosecutrix as well as the accused, would have recorded the statements of the two witnesses and would have drawn up a proper seizure-memo in regard to the Chaddi. That is the reason why we have said the investigation was slipshod and defective.”

In view of the forgoing discussion I am of the view that if the Investigating Officer has not taken into possession the clothes is of no avail to the defence and the contentions of the learned counsel for the appellant has no force.

22. The evidence of PW1-victim narrated the entire story. Her evidence is consistent. The appellant could not elicit anything during her cross examination which could lead me to take the inference that the evidence is unbelievable. The evidence of Madhama Nand PW2 is also credible and cogent which corroborates the evidence of the victim-PW1. Dr. R. Bahem PW3 medically examined the victim and she found the injuries on the person of the victim. The victim had stated that she resisted the appellant and he overpowered her and committed the rape. The presence of the injuries on the person of the victim further corroborates the evidence of the victim. The prosecution story is credible and cogent.

23. In view of the above discussion I am of the view that the prosecution has established the guilt beyond any reasonable doubt against the appellant. I am completely in agreement with the finding recorder by

the trial court. I find that the learned trial court has rightly convicted and sentenced the appellant and there is no infirmity in the judgment passed by the trial court. Hence, the appeal is dismissed and the conviction and sentence awarded by the Trial court are confirmed.

25. Let the lower court record be sent back to the court concerned for compliance. Compliance report be submitted within four months.

(J.C.S. RAWAT, J.)

Dated 07.03.2006
LSR